IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELALTE JURISDICTION

SECOND APPEAL NO. 163 OF 2003
WITH
SECOND APPEAL NO. 166 OF 2003.

Dattatraya Maruti Bhangre
r/o Bhangarwadi, Lkonavala
Tal Maval, Dist. Pune. ...Appellant.

Vs.

1, Mahadeo Maruti Bhangre
r/o Bhangarwadi, Lonavala,
Tal. Maval, Dist. Pune.

2. Raghunath Maruti Bhangre,
Since deceased by his Legal
Heirs;-

2-A. Vasant Raghunath Bhangre.

2-B. Smt. Sitabai Raghunath Bhangre,
since deceased through her
Legal Heirs 2A and 2G.

2C Sou. Komal Kishor Durge,
Residing at Sangvi, Pune.

3. Kisan Maruti Bhangre,
Since deceased through his
Legal Heirs ;

3-A.Ganpat Kisan Bhangre,

3-B Manohar Kisan Bhagre
Both residing at House
No. 206, A ward, Bhangarwadim,
Lonavala, Tal.Maval,Dist. Pune.

4. Smt. Thakubai Laxman Bhangre,
r/at Bhau Patil’s Chawl,
Khadki, Pune-3.

5. Sou. Suman Shankar Ghanekar,
Residing at Bhau Patil’s Chawl,

Khadki, Pune -3.

Mr.Uday Warunjikar with Mr. N.B. Shah for the appellants.

Mr. A.A. Kumbhakoni for respondent No.1.

CORAM : ANOOP V. MOHTA, J.

DATE : 24TH NOVEMBER, 2005

ORAL JUDGMENT

. Heard, both the Second Appeals, by consent, as appellant and respondents are undisputedly common and also the issues. The present suit for partition has been filed by the appellant/plaintiff Dattatraya an heir of one Mr. Maruti. In the suit specific pleadings were made by the plaintiffs stating that the sisters have waived their rights. Based on that foundation, the basic prayers for partition were made. The trial Court after considering the rival contentions between the parties, granted the plaintiff, 1/5th share in the joint family property, as described in schedule "A" of the plaint, except City Survey No. 205A and passed consequential reliefs which were necessary in the suit

for partition. Admittedly, no specific issue was raised about the non joinder of the parties, as contemplated under Order 1 Rule 13 of Code of Civil Procedure.

2. The appellate Court however, based on the pleadings, as well as, material on the record, came to a clear finding, as observed in para 36, which are reproduced as under;

"It was also the contention of the defendant/appellant, that all his sisters namely Smt. Sonabai, Smt. Mandabai and Smt. Godabai have waived their shares from the suit properties in favour of their brothers i.e. plaintiff No.1, defendants Nos. 2 and 3 and the appellant/defendant No.1, but except the oral words of the plaintiffs, there is no other documentary evidence to substantiate this point. There is no document of release of waiver of the shares of the daughters of the deceased Maruti Bhangre, namely Smt. Sonabai, Smt. Namabai and Smt. Godabai.

Therefore the theory of the plaintiffs, that his three sisters waived their right in favour of their brothers does not find force. Hence, all the sharers were the necessary parties to the suit for partition."

3. The contention as raised by the advocate for the appellant, in reference to the provisions of Hindu Succession Act, 1956 and specifically of section 6 is very clear.

4. Mr. Kumbhakoni, the learned Counsel, for

respondents has relied on the judgment **(Harischandra Vithoba Narawade and others V. Smt. Vastalabai w/o Narayan Shinde) (2004 (4) Mh.L.J. 897)** for the same proposition.

5. The Supreme Court has also in (Thimmaiah and Others V. Ningamma and Another) ((2000) 7 S.C.C. 409) explained the scheme as under;

"The decision in Gurupad Khandappa Magdum V. Hirabai Khandappa Magdum is in authority for the proposition that where a female is entitled to a share in coparcenary property on partition, then by virtue of Explanation I to Section 6 of the 1956 Act, she continues to be so entitled despite the fact that no partition may actually have taken place prior to the coparcener's death. This Court held that Explanation I to 6 covered a situation where a Hindu coparcener dies without actual partition having taken place. In such event, the Court will have to assume that a partition had in fact taken immediately prior to the death of the coparcener concerned and grant share on the basis of such notional partition. This Court also held that the share of the female member on such partition was in addition to any share which she may get as an heir of the deceased coparcener. (See also State of Maharashtra V. Narayan Rao Sham Rao Deshmukh AIR at p. 721)"

6. At this stage, position remained undisputed that the suits No.190/2005 were for the partition of property of the deceased- Maruti and property described in Schedule A & CTS 205A, the appellant has preferred two Second Appeals i.e. 163/2003 and 166/2003. There is no

doubt that the daughters have right in such property owned by their father. In this background, the provisions of amended section 29 (A) and (B) of Hindu Succession Act (w.e.f. 22/6/1994) (Maharashtra amendment 1994) (40 of 1994)) cannot be made applicable, as contended. Admittedly, the suit was filed prior to year 1947.

7. Therefore, the appellant/plaintiff being aggrieved by this order and judgment dated 29/6/2002 preferred this appeal.

8. Heard the learned Counsel appearing for the parties. In so far as undisputed position on the record that this is a suit between the heirs of deceased, Maruti (a) ancestral property (b) self acquired property. Without expressing anything on the merits, prima facie as the appellate Court has allowed the appeal, by settling aside the judgment and decree of the Lower Court in Reg.C.S.No.190/1985 and dismissed the suit on the foundation of non joinder of the daughters. The trial Court has also observed in reference to the rights of the sisters.

9. The basic of non-joinder of parties as contemplated under Order 1 Rule 13 also cannot be overlooked in such suit for partition. It is essential that all the sons and daughters right must be taken note of as it refers to the property of their deceased father. In this factual and legal background it cannot be said that the daughters are not necessary parties in a suit for partition filed by the son for the property of the father.

10. Taking all this in to account I am not inclined to interfere in the Second Appeal, as there is no substantial question of law involved.

11. However, it is quite clear that the plaintiff/appellant is at liberty to take appropriate steps, as advise, to file fresh suit for partition, after considering to join all the daughters i.e. sisters as a party.

. In view of this Second Appeal Nos. 163 of 2003 and 166 of 2003 are dismissed.

[7]

(ANOOP V.MOHTA,J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CIVIL APPLICATION NO. 204 OF 2003.
IN
SECOND APPEAL NO. 163 OF 2003

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

Mr.Uday Warunjikar with Mr. N.B. Shah for the appellants.

Mr. A.A. Kumbhakoni for respondent No.1.

CORAM : ANOOP V. MOHTA, J.

DATE : 24.11.2005

. In view of dismissal of Second Appeal No. 163 of 2003, noting survive in Civil Application No. 204 of 2003. Civil application is disposed of accordingly.

(ANOOP V.MOHTA,J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CIVIL APPLICATION NO. 205 OF 2003.
IN
SECOND APPEAL NO. 166 OF 2003

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

Mr.Uday Warunjikar with Mr. N.B. Shah for the appellants.

Mr. A.A. Kumbhakoni for respondent No.1.

CORAM : ANOOP V. MOHTA, J.

DATE : 24.11.2005

. Nothing survive in Civil Application No.205 of 2003,in view of dismissal of Second Appeal No. 166 of 2003. Civil Application is disposed of accordingly.

(ANOOP V.MOHTA,J.]